

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Matthew Fero; Roger A. Carroll, D.D.S.; Andres Curbelo; Cindy Harden; Cathryn Kwit; Robert Kwit; Harold Jackling; Nina Mottern; Barbara Palmer; Carole Preston; James J. Smith, Jr.; Sharon C. Smith; Dwayne Church; Don Korn; Therese Boomershine; Carlos Martinho; Thomas Albrecht; and Brenda Caltagarone, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

Excellus Health Plan Inc., Lifetime Healthcare, Inc., Lifetime Benefit Solutions, Inc., Genesee Region Home Care Association, Inc. d/b/a Lifetime Care, Genesee Valley Group Health Association d/b/a Lifetime Health Medical Group, MedAmerica, Inc., Univera Healthcare, and Blue Cross and Blue Shield Association,

Defendants.

Case No. 6:15-cv-06569

REVISED DISCOVERY PLAN

On July 10, 2019, the Court approved the Parties' previous proposed Joint Discovery Plan, which set case management deadlines at intervals following the Court ruling on Plaintiffs' class certification motion. *See* Dkt. # 366. On November 23, 2020, the Court issued a Decision and Order on Plaintiffs' Motion for Class Certification and related filings, which triggered the discovery deadlines. *See* Dkt. # 521. In response, on December 7, Plaintiffs petitioned the Second Circuit for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f). *See* Docket, *Fero v. Excellus Health Plan, Inc.*, No. 20-4088 (2d. Cir. 2020). Excellus filed an opposition to Plaintiffs' Petition. *Id.* Because the scope of the litigation will remain unclear while the Second Circuit considers these filings, the Parties

agree that it would be more efficient to modify certain pretrial deadlines. The joint Proposed Discovery Plan is as follows:

1. Consent to Trial by Magistrate Judge

The parties have not unanimously consented to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c).

2. Mandatory Disclosures

As set forth in their Joint Rule 26(f) Report (ECF No. 114 at ¶ 2), Plaintiffs and the Excellus Defendants exchanged the information required in Rule 26(a)(1)(A)(ii) and (iv) in early discovery and as part of early meet and confers in late 2015 and 2016, agreed to provide the information required in subsection (i) in response to Requests for Production which have been served, and agreed to waive all other initial disclosures. Plaintiffs and BCBSA exchanged mandatory disclosures under Rule 26(a)(1) on September 30, 2016.

3. Amendments to Pleadings

Judge Wolford set a deadline of February 20, 2018 for the parties to amend the pleadings and/or add parties. At that time, Plaintiffs moved to amend their Consolidated Master Complaint and to add an additional party Plaintiff. (ECF No. 184.) Judge Wolford granted that motion (ECF No. 191), and on March 22, 2018, Plaintiffs filed their Amended Consolidated Master Complaint. (ECF No. 193.) On March 25, 2019, Plaintiffs filed their Second Amended Master Complaint.

4. Expert Discovery

The Parties have completed expert discovery for class certification.

5. Class Certification

The Court has ruled on Plaintiffs' class certification motion.

6. Settlement/ADR/Mediation

On January 8, 2020, the parties engaged in mediation with private mediator, Bennet G. Picker, but did not reach an agreement to settle the case. The parties scheduled a second day of mediation but that was canceled once the Covid crisis began and the parties have not had substantive settlement discussions since then.

7. Completion of Fact Discovery

All factual discovery including depositions, shall be completed within 60 days of the Second Circuit's decision on the Petition for Permission to Appeal. Pending any decision on the Petition, written discovery will continue. The Parties intend to schedule depositions for after the Second Circuit's decision on the Petition for Permission to Appeal but will meet and confer should a need arise to take any earlier depositions. The Parties agree to meet and confer concerning additional revisions to this date as may be necessary.

8. Motions to Compel Discovery

All motions to compel discovery shall be filed at least 30 days prior to the factual discovery cutoff, 30 days after a party's final production of documents, or 30 days after service of a party's privilege log for its final production, whichever is later.

9. Other Expert Discovery

Plaintiffs shall identify any other expert witnesses and provide reports pursuant to Fed. R. Civ. P. Rule 26 by 90 days after the Second Circuit's decision on the Petition for Permission to Appeal. Defendants shall identify any other expert witnesses and provide reports pursuant to Fed. R. Civ. P. Rule 26 by 135 days after the Second Circuit's decision on the Petition for Permission to Appeal. The parties shall complete all discovery relating to any

other experts, including depositions, by 195 days after the Second Circuit's decision on the Petition for Permission to Appeal.

10. Daubert Motions

All Daubert Motions other than those related to experts for class certification shall be filed on or before 225 days after the Second Circuit's decision on the Petition for Permission to Appeal.

11. Dispositive Motions

The parties shall file dispositive motions on or before 255 days after the Second Circuit's decision on the Petition for Permission to Appeal.

12. Protective Orders

On March 30, 2016, Judge Wolford filed a Stipulated Qualified Protective Order pursuant to Fed. R. Civ. P. Rule 26(c). (ECF No. 95.)

13. Changes on Limitations on Discovery

The Parties generally disagree regarding scope of discovery currently permissible in the case in light of the Court's Order on class certification, but will meet and confer in an attempt to resolve any particular disputes and will seek judicial guidance if a compromise cannot be reached after good faith negotiations.

14. Electronically Stored Information

On March 30, 2016, Judge Wolford entered a Stipulated Order Governing Preservation and Discovery of Electronically Stored Information pursuant to Federal Rule of Evidence 502. (ECF No. 97.)

15. Federal Rule of Evidence 502 Agreement

On March 30, 2016, Judge Wolford entered a Stipulated Order Governing Preservation and Discovery of Electronically Stored Information pursuant to Federal Rule of Evidence 502. (ECF No. 97.)

16. Jury Trial

The parties reserve the right to a jury trial of the above referenced matter and believe the trial can be completed in 4 weeks.

Dated: January 9, 2021

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IT IS SO ORDERED.

/s/ Jeremiah J. McCarthy
HON. JEREMIAH J. MCCARTHY
UNITED STATES MAGISTRATE JUDGE